APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DATED AND FILED FEBRUARY 19, 1999

No. 97-5682

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

RANDALL J. LYNN,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE

OPINION

Before: DAUGHTREY and MOORE, Circuit Judges; COHN,* District Judge.

KAREN NELSON MOORE, Circuit Judge. Randall J. Lynn was convicted in the district court of running an illegal gambling business in violation of 18 U.S.C. § 1955

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* The Honorable Avern Cohn, United States District Judge for the Eastern District of Michigan, sitting by designation.

and of money laundering in violation of 18 U.S.C. §§ 1956(a)(1)(A)(i) and (B)(i). On appeal Lynn argues, inter alia, that the Tennessee gambling statutes on which the federal gambling charge was predicated are unconstitutionally vague and that, with regard to the money laundering counts, the indictment failed to allege and the evidence failed to establish the requisite level of scienter. We conclude that these contentions and Lynn's other assignments of error are without merit, and we **AFFIRM** Lynn's conviction and sentence.

I

Lynn operated a business known as RANCO that fabricated and distributed video games and gambling machines. RANCO placed the machines in truck stops, markets, bars, and other small business establishments. The gambling machines consisted of electronic poker and slot machines, and successful players received cash payouts from the proprietor. The net profits generated by the machines were divided equally between the host establishments and Lynn. Lynn and/or RANCO acquired a number of general business and video game licenses, and, although most transactions involved cash, apparently little or no effort was made to conceal the nature of this business.

RANCO's operations were substantial. From 1991 through 1993 the IRS conducted a civil audit of RANCO which found unreported income of $439,345 for the tax years 1989 through 1991. A 1994 search of RANCO's offices conducted by federal authorities uncovered approximately $396,000 in cash.

Appendix A

During the course of an undercover investigation conducted in 1993 by the Tennessee Bureau of Investigation, Lynn agreed to assist an agent, who was posing as a businessman, in setting up a tavern in exchange for the agent's agreement to install Lynn's gambling machines under the standard profit-sharing arrangement. Another undercover agent gambled on Lynn's machines in various establishments and routinely received cash payoffs when he won.

In 1996 Lynn was indicted in federal court on charges of operating an illegal gambling business in violation of 18 U.S.C. § 1955 and of laundering the proceeds in violation of 18 U.S.C. § 1956. An additional count charged that the property involved in the money laundering operation was subject to forfeiture. A jury convicted Lynn on the gambling and laundering counts but deadlocked on forfeiture. The forfeiture count subsequently was dismissed. Lynn filed a timely appeal challenging his conviction and the sentence imposed. Subsequently, Lynn filed a motion seeking to stay these proceedings pending the resolution of an appeal from a Tennessee trial court decision declaring unconstitutional the state gambling statutes that underpin Lynn's federal convictions.

The district court properly exercised jurisdiction pursuant to 18 U.S.C. § 3231. We have jurisdiction over the appeal pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

Appendix A

II

Count One of the indictment charged Lynn with a violation of 18 U.S.C. § 1955, which makes it a federal crime to conduct certain gambling businesses in violation of state law. It was specifically charged that Lynn "did knowingly and willfully conduct, finance, manage, supervise, direct and own all or part of an illegal gambling business involving the fabrication and operation of gambling devices, including video poker machines and video slot machines, in violation of the laws of the State of Tennessee (Tennessee Code Annotated, Sections 39-17-501 to 505). . . ." J.A. at 11. Lynn argues that the Tennessee gambling provisions are unconstitutionally vague and, thus, that a conviction based upon the violation of these statutes violates due process. The district court rejected this argument pretrial. We review this question of law de novo. *See United States v. Levy*, 904 F.2d 1026, 1029 (6th Cir. 1990), *cert. denied*, 498 U.S. 1091 (1991).

Under the Tennessee statutes, "[a] person commits an offense who knowingly engages in gambling," TENN. CODE ANN. § 39-17-502, or who knowingly engages in certain gambling related activities. TENN. CODE ANN. §§ 39-17-503, 504. Gambling devices also are outlawed. TENN. CODE ANN. § 39-17-505. Among others, the statute provides the following definitions:

> (1) "Gambling" means risking anything of value for a profit whose return is to any degree contingent on chance, but does not include a lawful business transaction;

Appendix A

* * *

> (3) "Gambling device or record" means anything designed for use in gambling, intended for use in gambling, or used for gambling;
>
> (4) "Lawful business transaction" as used in subdivision (1), includes any futures or commodities trading. . . .

TENN. CODE ANN. § 39-17-501. A comment to this section explains that the definitions are intentionally broad and are intended to reach "any scheme by which value is risked upon a chance for greater value. . . . The definition of 'gambling' includes lotteries, chain or pyramid clubs, numbers, pinball, poker or any as of yet unnamed scheme where value is risked for profit." TENN. CODE ANN. § 39-17-501, Sentencing Commission Comments.

This court recently has rejected an identical void-for-vagueness challenge to a § 1955 conviction predicated on violation of the Tennessee gambling statutes. *See United States v. Hill*, Nos. 97-6051/6286/6308/6309 (6th Cir. Feb. 17, 1999). There, we noted that in cases, such as this, in which constitutionally protected content is not threatened, the vagueness challenge fails if the defendant had fair notice that his conduct was proscribed by the relevant statutes. *See id.* at 11. As we discussed in *Hill*, the operation of video gambling machines clearly is proscribed under the Tennessee gambling statutes. *See id.* at 13. Accordingly,

we reject Lynn's due process challenge to his § 1955 conviction.[1]

Lynn also was convicted of money laundering pursuant to 18 U.S.C. §§ 1956(a)(1)(A)(i) and (B)(i).[2] At trial the

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1. Because we conclude that the Tennessee gambling provisions are not unconstitutionally vague as applied to Lynn's activities, we deny Lynn's motion seeking to stay this appeal pending the outcome of unrelated state court proceedings that may address the constitutionality of the statute. *See Hill*, slip op. at 8-9 (denying identical motion in identical circumstance). As we noted in *Hill*, Lynn is not precluded from seeking relief pursuant to 28 U.S.C. § 2255 should the Tennessee Supreme Court declare the state provisions unconstitutional.

2. Section 1956 provides in relevant part:

> (a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity —
>
> (A)(i) with the intent to promote the carrying on of specified unlawful activity; or
>
> (B) knowing that the transaction is designed in whole or in part —
>
> (i) to conceal or disguise the nature, the location, the source,

(Cont'd)

government showed that Lynn used illegally derived funds to purchase materials to manufacture additional gambling machines and that illegally derived funds were spent or deposited in such a manner as to conceal the nature, source, or ownership of the funds. Lynn argues, however, that § 1956(c)(1) requires the government to demonstrate that the defendant knew that the underlying activity was a felony in order to convict under the federal money laundering statute, and he asserts that the indictment failed to allege and that the evidence failed to prove that he knew that his gambling business constituted a felony. Lynn admits that he knew that his business operations were unlawful, but he claims that he thought that the operations constituted a misdemeanor and not a felony. In *Hill*, after considering

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(Cont'd)

> the ownership, or the control of the proceeds of specified unlawful activity; or
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> * * *
>
> shall be sentenced to a fine . . . or imprisonment.
>
> * * *
>
> (c) As used in this section —
>
> (1) the term "knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity" means that the person knew the property involved in the transaction represented proceeds from some form, though not necessarily which form, of activity that constitutes a felony under State, Federal, or foreign law. . . .

the plain meaning of the statute, the legislative history, and the considered opinions of our sister circuits, we rejected the "knowledge-of-a-felony" interpretation of the § 1956(c)(1) scienter requirement argued by Lynn. *See Hill*, slip op. at 14-21. There,

> we conclude[d] that the government is not required to show that the defendant knew the precise nature of the unlawful activity; i.e., that he knew it was felonious as opposed to misdemeanor activity, as long as the government shows the defendant knew the money was from some form of unlawful activity and further shows that the unlawful activity at issue was in fact a felony. . . .

Id. at 17-18. Given this court's interpretation § 1956(c)(1), several of Lynn's assignments of error are readily resolved.

Counts Two through Eighty-two of the indictment charged Lynn with money laundering in violation of § 1956. The indictment tracks the language of § 1956 charging, inter alia, that the transactions "involved the proceeds of a specified unlawful activity" and that Lynn knew that the property involved "represented the proceeds of unlawful activity." J.A. at 12-18. Lynn's only complaint with the indictment is that it failed to allege that Lynn knew that the unlawful activity that generated the property amounted to a felony.

"[A]n indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs a

defendant of the charge against which he must defend, and second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense." *Hamling v. United States*, 418 U.S. 87, 117 (1974). *Accord United States v. Paulino*, 935 F.2d 739, 750 (6th Cir. 1991), *cert. denied*, 502 U.S. 914, 917, 1014 (1991), *and cert. denied*, 502 U.S. 1036 (1992). Because Lynn's knowledge that the proceeds-generating activity constituted a felony is *not* an element of the § 1956 offense, the indictment adequately informed Lynn of the charges and was sufficient.

Similarly, Lynn's only complaint regarding the sufficiency of the evidence used to convict him on the money laundering counts is that no evidence was presented that Lynn knew of the felonious nature of the activities that generated the laundered property. Again, because this specific knowledge is not a required element of the offense, this contention fails.

Lynn next argues that the jury instructions were confusing and inadequate with regard to the scienter requirement. We review the district court's instructions to the jury to determine "whether the charge, taken as a whole, fairly and adequately submits the issues and applicable law to the jury." *United States v. Martin*, 740 F.2d 1352, 1361 (6th Cir. 1984).

The district court provided the jury with the following instruction regarding scienter:

> Next I want to talk about the required mental state of the defendant. The indictment charges

> that the defendant committed the acts of money laundering "knowingly." As I've already explained, this means that the defendant must have known that the property involved was the proceeds of a felony under federal law, This means that the defendant Randall J. Lynn must have known that he was operating an illegal gambling business under 18 U.S.C. § 1955, which implies that he knew the activity of his business constituted illegal gambling under Tennessee law.

J.A. at 223. Earlier in the charge the judge had instructed the jury that to be convicted the defendant had to have known that the laundered property represented the proceeds of an illegal gambling business, and he instructed the jury that operating an illegal gambling business in violation of 18 U.S.C. § 1955 is a felony.

We think it likely that the jury inferred the proper scienter requirement from these instructions, that is, that Lynn must have known that his business activities were illegal in order to convict him of a violation of § 1956. If, however, the jury inferred a heightened scienter requirement, any error in the instructions was surely harmless. Obviously, if the jury believed that it must find, and did find, that Lynn knew that the crimes involved were felonious, the jury certainly determined that Lynn knew that the activities were unlawful. We conclude, therefore, that these instructions were adequate.

The district court also provided a general "willful blindness" instruction based on the Sixth Circuit pattern. Lynn complains that evidence of deliberate ignorance was insufficient to justify the use of this instruction. We disagree.

The willful blindness instruction is to "be used only when there is some evidence of deliberate ignorance." *United States v. Lee*, 991 F.2d 343, 350 n.2 (6th Cir. 1993). The evidence of deliberate ignorance relied upon by the district court in justifying the instruciton was drawn from Lynn's testimony at trial. Lynn testified that he or his machines had been the subject of law enforcement raids in 1989 and 1994, and that he assumed that wrongful use of the games was a misdemeanor, but that he did not try to find out the state of the law. The raids alone should have been sufficient to cause a reasonable businessman to determine the legality of his operations. Viewed in the light most favorable to the government, the evidence was sufficient to justify the use of the willful blindness instruction.[3]

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3. *United States v. Wuliger*, 981 F.2d 1497 (6th Cir. 1992), *cert. denied*, 510 U.S. 1191 (1994), cited by Lynn, is inapposite. There, the trial court failed properly "to instruct the jury that it had to find the defendant knew or had reason to know that [certain] recordings were made in violation of the" wiretapping statute in order to convict the defendant under that statute. *Id.* at 1503. The court rejected the government's argument that a willful blindness instruction given by the judge filled the gap created by the failure to charge scienter. *See id.* In the present case the willful blindness instruction supplements an adequate instruction on scienter.

The jury deadlocked on Count Eighty-two of the indictment, which provided for the forfeiture of property involved in Counts One through Eighty-one. Because the forfeiture count required only a finding by the preponderance of the evidence that the property was illegally derived, while the previous counts required proof beyond a reasonable doubt, Lynn argues that the jury must have been confused in order to convict on Counts One through Eighty-one and deadlock on Eighty-two. Contrary to Lynn's assertion, however, it is not certain that the jury was confused, and, in any event, inconsistent verdicts do not constitute grounds for reversal.

As the government points out, forfeiture is controversial. Moreover, legally and illegally derived funds were commingled in the present case. The illegally derived funds may have been spent, and the jury may have been sympathetic to Lynn's argument that legally derived funds should not be forfeited. In any event, because inconsistent verdicts are as easily attributable to lenity or mistake in favor of the defendant on one or more counts as they are to a mistaken conviction on other counts and because the government may not appeal an acquittal, it is well established that an inconsistent verdict is not grounds for reversal. *See United States v. Powell*, 469 U.S. 57, 64-65 (1984); *United States v. Silva*, 846 F.2d 352, 357-58 (6th Cir.), *cert. denied*, 488 U.S. 941 (1988).

Although Lynn put the government to its proof at trial, he argues that he admitted his involvement in the gambling business and that the district court's refusal to award a sentencing adjustment for acceptance of responsibility was

error. As an issue of fact, we review the trial court's determination regarding acceptance of responsibility for clear error. *See United States v. Downs*, 955 F.2d 397, 400 (6th Cir. 1992).

The Sentencing Guidelines commentary makes it clear that an adjustment for acceptance of responsibility is not precluded by a defendant's assertion of his constitutional right to trial. An adjustment in such a case is expected to be rare, however, and is conceivable primarily in a situation in which a defendant admits his factual guilt but goes to trial to test the constitutionality or applicability of a statute. *See* U.S. SENTENCING GUIDELINES MANUAL ("U.S.S.C.") § 3E1.1 commentary, applic. note 2.

Although Lynn tested the constitutionality of the statutes at trial, he also contested his factual guilt. For example, Lynn attempted to establish a lack of intent by testifying at trial that he did not know that his machines were being used for gambling. Similarly, Lynn never admitted to operating anything other than a legitimate business. The district court did not clearly err in refusing to award Lynn a sentencing adjustment for acceptance of responsibility.[4]

4. Lynn errs in contending that this court's decision in *United States v. Fleener*, 900 F.2d 914 (6th Cir. 1990), supports an adjustment in his case. The court in *Fleener* merely held that an adjustment was available and that the district judge did not commit clear error in granting an acceptance of responsibility adjustment in the case of a defendant who went to trial on an entrapment defense. *See id.* at 918. Here, there is no assertion that the district judge thought the adjustment was unavailable; he simply thought it unwarranted.

Lynn next argues that his case falls outside of the heartland of money laundering offenses and that the trial court erred in refusing to grant a downward sentencing departure. It is well established, however, that, unless the trial court believed it lacked the discretion to make a downward departure, the decision of the district court not to depart is unreviewable. *See* 18 U.S.C. § 3742(a); *United States v. Abdullah*, 162 F.3d 897, 905-06 (6th Cir. 1998). No assertion has been made in the present case that the district judge believed that he lacked the discretion to depart. The judge simply determined that this case was within the heartland of money laundering offenses. This determination is unreviewable.[5]

Lynn also argues that the government concealed the true nature of a civil IRS investigation into his business operations and that this concealment constitutes outrageous government conduct that violated his due process rights. The government asserts, and Lynn does not deny, that this claim was not raised in the trial court. The government also argues, and Lynn admits, that this court has rejected this defense in any event. *See United States v. Tucker*, 28 F.3d 1420, 1428 (6th Cir. 1994), *cert. denied*, 514 U.S. 1049 (1995). There are no exceptional circumstances to compel this court to address this forfeited claim. *See Pinney Dock & Transp. Co. v. Penn. Cent. Corp.*, 838 F.2d 1445, 1461 (6th Cir.), *cert. denied*, 488 U.S. 880 (1988).

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5. *United States v. Skinner*, 946 F.2d 176 (2d Cir. 1991), cited by Lynn, is inapposite. There, the appellate court determined that the trial judge believed that he lacked the discretion to depart. *See id.* at 179.

Appendix A

III

For the foregoing reasons, we **AFFIRM** Lynn's conviction and sentence.

APPENDIX B — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE AT CHATTANOOGA DATED AND FILED JUNE 3, 1997

United States District Court
Eastern District of Tennessee at Chattanooga

UNITED STATES OF AMERICA

v.

Randall J. Lynn

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)
Case Number: 1:96CR00071-001
Peter Strianse, (Retained Counsel)
Defendant's Attorney

THE DEFENDANT:

* * *

☒ was found guilty on count(s) **1,2-46, 47-79 and 81 of the Indictment.** after a plea of not guilty

Title & Section:	18 U.S.C. § 1955
Nature of Offense:	Aid and Abet and Operation of an Illegal Gambling Business
Date Offense Concluded:	04/01/1992
Count Number(s):	1

Appendix B

Title & Section:	18 U.S.C. §1956(a)(1)(A)(i)
Nature of Offense:	Aid and Abet and Money Laundering w/Intent to Promote the Carrying On of Specified Unlawful Activity
Date Offense Concluded:	01/04/1994
Count Number(s):	2-46
Title & Section:	18 U.S.C. § 1956(a)(1)(B)(i)
Nature of Offense:	Money Laundering to Conceal the Proceeds of Specified Unlawful Activity
Date Offense Concluded:	02/01/1994
Count Number(s):	47-79
Title & Section:	18 U.S.C. § 1956(a)(1)(A)(i)
Nature of Offense:	Money Laundering to Conceal the Proceeds of Specified Unlawful Activity
Date Offense Concluded:	03/01/1994
Count Number(s):	81

The defendant is sentenced as provided through pages 2 through 9 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

* * *

☒ Count(s) 80 & 82 are dismissed on the motion of the United States.

Appendix B

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 408-94-3441

Defendant's Date of Birth: 11/07/1954

Defendant's USM No.: 15384-074

Defendant's Residence Address:
10804 Pine Hill Road
Mc Donald TN 37353

Defendant's Mailing Address:
10804 Pine Hill Road
McDonald TN 37353

06/02/1997
Date of Imposition of Judgment

s/ R. Allan Edgar
Signature of Judicial Officer

R. Allan Edgar
U.S. District Judge
Name & Title of Judicial Officer

June 3, 1997
Date

Appendix B

[stamp]
ATTEST: A true copy Certified
this JUN 03 1997
R. MURRY HAWKINS, CLERK
by s/ [illegible] Dep. Clerk

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **67 month(s).**

on each of counts 2-79 and 81, and 60 months on Count 1, all to be served concurrently.

* * *

☒ The defendant shall surrender to the United States Marshal for this district:

* * *

☒ as Notified by the United States Marshal.

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APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED APRIL 9, 1999

97-5682

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

RANDALL J. LYNN,

Defendant-Appellant.

ORDER

BEFORE: DAUGHTREY and MOORE, Circuit Judges; and COHN,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

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* Hon. Avern Cohn, United States District Judge for the Eastern District of Michigan, sitting by designation.

Appendix C

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER
OF THE COURT

s/ Leonard Green
Leonard Green, Clerk